

Miller v Nickerson Beach Campground

2013 NY Slip Op 32782(U)

January 14, 2013

Sup Ct, Nassau County

Docket Number: 12696/2012

Judge: Jeffrey A. Goodstein

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. JEFFREY A. GOODSTEIN
Acting Supreme Court Judge

JUDSON MILLER,

Plaintiff,

- against -

NICKERSON BEACH CAMPGROUND
and COUNTY OF NASSAU,

Defendants.

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Index No.: 12696/2012
Motion Date: 1/9/13
Sequence No.: 1

ORDER

The following papers were read on this motion:

- Notice of Motion to Dismiss Complaint.....1
- Affirmation in Opposition to Motion to Dismiss.....2
- Reply Affirmation.....3

The Plaintiff filed the instant suit against Nickerson Beach Campground and the County of Nassau as a result of injuries he sustained while camping at the former's establishment. The Plaintiff alleges that on August 26, 2010, while camping at Nickerson Beach Campground, he was severely injured after plugging an electrical cord from his camper into a outlet provided by the campground. According to the Plaintiff, immediately after he inserted said cable into said outlet the outlet "violently exploded", causing the Plaintiff to suffer a number of serious bodily injuries including a corneal abrasion and burning of his left eye.

The Plaintiff properly served the Defendants with a Notice of Claim on or about September 29, 2010, and a 50-h hearing was subsequently held on March 3, 2011. However, the Plaintiff failed

to serve a summons and complaint on the Defendants until October 9, 2012. In light of this fact, Defendants have brought the instant application seeking dismissal of the complaint based upon Plaintiff's alleged failure to commence the action within the applicable statute of limitations period set forth in General Municipal Law § 50-i.

General Municipal Law § 50-i(1)(c) provides, in pertinent part, that an action against a municipality for personal injury based upon a theory of negligence on the part of said municipality shall not be maintained unless, "the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based..." "An action is commenced by filing a summons and complaint or summons with notice." (CPLR § 304).

Here, as mentioned above, the event upon which the Plaintiff's claim is predicated occurred on August 26, 2010 and the action was not commenced until October 9, 2012, over two years later. Thus, the Plaintiff failed to bring suit within the statutorily prescribed time.

The Plaintiff acknowledges that he failed to comply with the provisions of General Municipal Law § 50-i(1)(c), but cites to CPLR § 2004 and § 2005 for the proposition that the Court may nonetheless allow the Plaintiff's claim to go forward. CPLR § 2004 provides that "[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application is made before or after the expiration of the time fixed." In enumerating what constitutes "good cause", the legislature enacted CPLR § 2005, which provides that "law office failure" can serve as good cause for a court to "excuse delay or default."

Relying on the aforementioned provisions, Plaintiff's

counsel alleges in their affirmation that the reason for their delay in serving the Defendants and commencing the instant action was an "isolated law office oversight". They explain that due to alleged "staffing issues" there was an internal mis-communication within their office, which led them to believe that service of the Plaintiff's summons and complaint had been accomplished prior to the expiration of the statutorily prescribed time, when in fact it had not. Accordingly, Plaintiff's counsel contends that their client should not be deprived of his day in court because of their "isolated neglect", and requests that the Court use the discretion granted it pursuant to CPLR § 2004 to disregard their failure to commence the action in a timely manner.

The Court of Appeals has explicitly held that the year-and-ninety-day period for commencing a personal injury action against a municipality, provided in General Municipal Law § 50-i(1)(c), is a statute of limitations rather than a condition precedent. (Joseph Campbell v. City of New York, 4 NY3d 200 [2005]).

Furthermore, CPLR § 2004 specifically provides in its practice commentaries that the statute of limitations is not included within its province and cannot be extended by a court. Thus, because the year-and-ninety-day commencement period provided by General Municipal Law § 50-i(1)(c) has been deemed a statute of limitations, the Court has no discretion to disregard said period, even if good cause is shown. (See Dioguardi v. Glassey, 5 AD3d 430 [2d Dept. 2004] ([I]n general, courts have no inherent power to extend the statute of limitations in the interest of justice); CPLR § 201).

Incidentally, although the Defendants' are correct that the complaint should be dismissed for the Plaintiff's failure to comply with the provisions of General Municipal Law 50-i, their requested relief is not on point. Since the year-and-ninety-day provision provided in General Municipal Law § 50-i(1)(c) is a

statute of limitations rather than a condition precedent, the Defendants should have brought their motion to dismiss pursuant to CPLR Rule 3211(a)(5) rather than CPLR 3211 Rule(a)(7).


However, bringing a motion to dismiss under the wrong subsection of the CPLR does not prevent a court from reaching the merits of the case when deciding whether dismissal is appropriate. (Digital Centre, S.L. v. Apple Industries, Inc., 94 AD3d 571 [1d Dept. 2012]). The Defendant sufficiently laid out the correct grounds for seeking dismissal in its Notice of Motion by asserting that, the "Plaintiff's action is time-barred by the statute of limitations..." and thus, the Plaintiff "cannot plead compliance with the General Municipal Law as is specifically required in GML § 50-I."

Accordingly, the Defendant's motion seeking to dismiss the Plaintiff's summons and complaint in their entirety is GRANTED.

This constitutes the Decision and Order of this Court.

Dated: Mineola, New York
January 14, 2013

E N T E R :



HON. JEFFREY A. GOODSTEIN
A.J.S.C.

HON. JEFFREY A. GOODSTEIN

ENTERED

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